

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 06-60094-CR-LENARD

UNITED STATES OF AMERICA

vs.

ZHIVARGO MCBRIDE,

Defendant.

_____ /

PLEA AGREEMENT

The United States of America and ZHIVARGO MCBRIDE (hereinafter referred to as the “defendant”) enter into the following agreement:

1. The defendant agrees to plead guilty to the indictment as charged. Counts one through eight (1-8) charge the defendant with Alien Smuggling for Profit in violation of Title 8, United States Code Section 1324(a)(2)(B)(ii). Counts nine through eleven (9-11) charge the defendant with Bringing in Aliens at a Place Other than a Designated Port of Entry Resulting in Death in violation of Title 8, United States Code, Sections 1324(a)(1)(A)(i), 1324(a)(1)(A)(v)(II), and 1324(a)(1)(B)(iv). Count twelve (12) charges the defendant with Bringing in Aliens at a Place Other than a Designated Port of Entry Resulting in Serious Bodily Injury in violation of Title 8, United States Code, Sections 1324(a)(1)(A)(i), 1324(a)(1)(A)(v)(II), and 1324(a)(1)(B)(iii). Counts thirteen through fifteen (13-15) charge the defendant with Second Degree Murder in violation of Title 18, United States Code, Sections 7 (1) and 1111.

2. The defendant is aware that the sentence will be imposed by the court after considering the Federal Sentencing Guidelines and Policy Statements (hereinafter "Sentencing Guidelines"). The defendant acknowledges and understands that the court will compute an advisory sentence under the Sentencing Guidelines and that the applicable guidelines will be determined by the court relying in part on the results of a Pre-Sentence Investigation by the court's probation office, which investigation will commence after the guilty plea has been entered. The defendant is also aware that, under certain circumstances, the court may depart from the advisory sentencing guideline range that it has computed, and may raise or lower that advisory sentence under the Sentencing Guidelines. The defendant is further aware and understands that the court is required to consider the advisory guideline range determined under the Sentencing Guidelines, but is not bound to impose that sentence; the court is permitted to tailor the ultimate sentence in light of other statutory concerns, and such sentence may be either more severe or less severe than the Sentencing Guidelines' advisory sentence. Knowing these facts, the defendant understands and acknowledges that the court has the authority to impose any sentence within and up to the statutory maximum authorized by law for the offenses identified in paragraph 1 and that the defendant may not withdraw the plea solely as a result of the sentence imposed.

3. The United States and the defendant agree that, although not binding on the probation office or the court, they will jointly recommend that the court impose a sentence within the advisory sentencing guideline range produced by application of the Sentencing Guidelines. Although not binding on the probation office or the court, the

United States and the defendant further agree that, except as otherwise expressly contemplated in this Plea Agreement, they will jointly recommend that the court neither depart upward nor depart downward under the Sentencing Guidelines when determining the advisory sentencing guideline range in this case.

4. The United States agrees that it will recommend at sentencing that the court reduce by two levels the sentencing guideline level applicable to the defendant's offense, pursuant to Section 3E1.1(a) of the Sentencing Guidelines, based upon the defendant's recognition and affirmative and timely acceptance of personal responsibility. If at the time of sentencing the defendant's offense level is determined to be 16 or greater, the government will make a motion requesting an additional one level decrease pursuant to Section 3E1.1(b) of the Sentencing Guidelines, stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently. The United States, however, will not be required to make these recommendations if the defendant: (1) fails or refuses to make a full, accurate and complete disclosure to the probation office of the circumstances surrounding the relevant offense conduct; (2) is found to have misrepresented facts to the government prior to entering into this plea agreement; or (3) commits any misconduct after entering into this plea agreement, including but not limited to committing a state or federal offense, violating any term of release, or making false statements or misrepresentations to any governmental entity or official.

5. The United States and the defendant agree that, although not binding on the probation office or the court, they will jointly recommend that the court make the following findings and conclusions as to the sentence to be imposed:

- a. **Guideline Manual to be Utilized:** Because the offense charged occurred on November 5, 2005, the United States Sentencing Commission Sentencing Guideline Manual effective November 1, 2005 shall be utilized.
- b. **Base Offense Level – Alien Smuggling:** The base offense level for Counts 1-12 is a Level 12 pursuant to 2L1.1(a)(2).
- c. **Number of Aliens Smuggled:** For the purpose of Section 2L1.1(b)(2), the offense involved the smuggling and transportation of between six (6) and twenty-four (24) unlawful aliens.
- d. **Risk of Harm:** The offense involved intentionally or recklessly creating a substantial risk of death or serious bodily injury to another person, thus, pursuant to Section 2L1.1(b)(5), the resulting offense level is increased to a level 18.
- e. **Death or Injury:** Pursuant to Section 2L1.1(b)(6)(4), because a death resulted from the defendant's conduct, the offense level is increased by eight (8) levels.
- f. **Cross Reference:** Because a person was killed under circumstances that constitute murder under 18 U.S.C. 1111, it is appropriate to apply the applicable murder guideline from Chapter Two, Part A, Subpart 1. In this case, the appropriate guideline is found in Guideline Section 2A1.2, entitled Second Degree Murder, wherein the Base Offense Level is a level 38.
- g. **Base Offense Level – Second Degree Murder:** The base offense level for Counts 13-15 is a Level 38 pursuant to 2A1.2.
- h. **Grouping of Offenses:** The parties agree that pursuant to Chapter 3, Part D of the Sentencing Guidelines, all counts of conviction shall be grouped together.
- i. **All Counts to Run Concurrently:** The parties agree to recommend to the Court that all counts of conviction run *concurrent* to each other.

- j. **Overall Guideline Range:** The parties agree that the defendant's overall guideline range as a result of the application of the Sentencing Guidelines is a **level 38** prior to any credit or reduction for acceptance of responsibility.

6. The defendant agrees that he shall cooperate fully with this Office by:

(a) providing truthful and complete information and testimony, and producing documents, records and other evidence, when called upon by this Office, whether in interviews, before a grand jury, or at any trial or other court proceeding;

(b) appearing at such grand jury proceedings, hearings, trials, and other judicial proceedings, and at meetings, as may be required by this Office; and

(c) if requested by this Office, working in an undercover role to contact and negotiate with other alien smugglers, as well as others suspected and believed to be involved in criminal misconduct, under the supervision of, and in compliance with, law enforcement officers and agents.

7. This Office reserves the right to evaluate the nature and extent of the defendant's cooperation and to make the defendant's cooperation, or lack thereof, known to the court at the time of sentencing. If in the sole and unreviewable judgment of this Office the defendant's cooperation is of such quality and significance to the investigation or prosecution of other criminal matters as to warrant the court's downward departure from *the advisory sentence* calculated under the Sentencing Guidelines, this Office may at or before sentencing make a motion consistent with the intent of Section 5K1.1 of the Sentencing Guidelines prior to sentencing, or Rule 35 of the Federal Rules of Criminal Procedure subsequent to sentencing, reflecting that the defendant has provided substantial assistance and recommending that the defendant's sentence be reduced from the advisory

sentence suggested by the Sentencing Guidelines. The defendant acknowledges and agrees, however, that nothing in this Agreement may be construed to require this Office to file any such motion(s) and that this Office's assessment of the nature, value, truthfulness, completeness, and accuracy of the defendant's cooperation shall be binding insofar as the appropriateness of this Office's filing of any such motion is concerned.

8. If the defendant intentionally provides false, misleading or incomplete information or testimony or otherwise fails or refuses to fully and truthfully cooperate with the United States as set forth above, the defendant's guilty plea will stand, but in all other respects this agreement shall be null and void, and the government's obligations under this plea agreement will terminate. The defendant shall thereafter be subject to prosecution for any federal criminal violation of which this office has knowledge including but not limited to perjury, obstruction of justice and any counts or offenses which were dismissed and/or not prosecuted as a result of this plea agreement. Any such prosecution may be premised upon any information provided by the defendant during the course of his cooperation and such information may be used against him.

9. The defendant understands and acknowledges that the Court is under no obligation to grant the motion(s) referred to in paragraph 7 of this agreement should the government exercise its discretion to file any such motion. The defendant also understands and acknowledges that the court is under no obligation to reduce the defendant's sentence because of the defendant's cooperation.

10. The defendant also understands and acknowledges that as to counts one through eight (1-8) of the indictment, the court may impose a statutory maximum term of

ten years imprisonment, and shall impose a mandatory minimum sentence of 3 years, followed by a term of supervised release of up to 3 years. As to counts nine through eleven (9-11) of the indictment, the court may impose a statutory maximum term of life imprisonment, followed by a term of supervised release of up to 5 years. As to count twelve (12), the court may impose a statutory maximum term of up to twenty imprisonment, followed by a term of supervised release of up to 3 years. As to counts thirteen through fifteen (13-15), the court may impose a statutory maximum term of life imprisonment, followed by a term of supervised release of up to 5 years. Additionally, in addition to a term of imprisonment and supervised release, the court may impose a fine of up to \$250,000 as to each count and may order restitution.

11. The defendant further understands and acknowledges that, in addition to any sentence imposed under paragraph 2 of this agreement, a special assessment in the amount of \$100 per count, for a total of one-thousand five hundred dollars (\$1,500), will be imposed on the defendant. The defendant agrees that any special assessment imposed shall be paid at the time of sentencing.

12. The Office of the United States Attorney for the Southern District of Florida (hereinafter "Office") reserves the right to inform the court and the probation office of all facts pertinent to the sentencing process, including all relevant information concerning the offenses committed, whether charged or not, as well as concerning the defendant and the defendant's background. Subject only to the express terms of any agreed-upon sentencing recommendations contained in this agreement, this Office further

reserves the right to make any recommendation as to the quality and quantity of punishment.

13. The defendant is aware that the sentence has not yet been determined by the court. The defendant also is aware that any estimate of the probable sentencing range or sentence that the defendant may receive, whether that estimate comes from the defendant's attorney, the government, or the probation office, is a prediction, not a promise, and is not binding on the government, the probation office or the court. The defendant understands further that any recommendation that the government makes to the court as to sentencing, whether pursuant to this agreement or otherwise, is not binding on the court and the court may disregard the recommendation in its entirety. The defendant understands and acknowledges, as previously acknowledged in paragraph 2 above, that the defendant may not withdraw his plea based upon the court's decision not to accept a sentencing recommendation made by the defendant, the government, or a recommendation made jointly by both the defendant and the government.

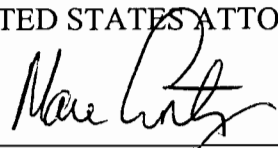
14. The defendant is aware that Title 18, United States Code, Section 3742 affords the defendant the right to appeal the sentence imposed in this case. Acknowledging this, in exchange for the undertakings made by the United States in this plea agreement, the defendant hereby waives all rights conferred by Section 3742 to appeal any sentence imposed, including any restitution order, or to appeal the manner in which the sentence was imposed, unless the sentence exceeds the maximum permitted by statute or is the result of an upward departure from the guideline range that the court establishes at sentencing. The defendant further understands that nothing in this

agreement shall affect the government's right and/or duty to appeal as set forth in Title 18, United States Code, Section 3742(b). However, if the United States appeals the defendant's sentence pursuant to Section 3742(b), the defendant shall be released from the above waiver of appellate rights. By signing this agreement, the defendant acknowledges that he has discussed the appeal waiver set forth in this agreement with his attorney. The defendant further agrees, together with the United States, to request that the district court enter a specific finding that the defendant's waiver of his right to appeal the sentence to be imposed in this case was knowing and voluntary.

15. This is the entire agreement and understanding between the United States and the defendant. There are no other agreements, promises, representations, or understandings.

Date: 1/23/07

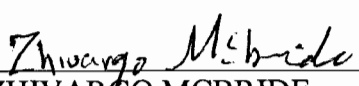
R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

By: 
MARC S. ANTON
SPECIAL ASSISTANT U. S. ATTORNEY

Date: 1-23-07

By: 
ALLEN KAUFMAN
ATTORNEY FOR DEFENDANT

Date: 1-23-07

By: 
ZHIVARGO MCBRIDE
DEFENDANT